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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

STEVEN E. M. ROTH, Plaintiff and Appellant, v. JOSEPH FRYZER et al., Defendants and Respondents.	B209274 (Los Angeles County Super. Ct. No. BC377593)

APPEAL from judgments of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Glickman & Glickman and Steven C. Glickman for Plaintiff and Appellant.

Silver & Freedman and Mitchell B. Stein for Defendant and Respondent Joseph Fryzer.

Lee & Kaufman, Martin J. Kaufman; Law Offices of H. Jason Cohen, H. Jason Cohen; Law Offices of Sanford M. Passman and Sanford M. Passman for Defendants and Respondents Herman J. Cohen and Sanford M. Passman.

In prior litigation, an investor sued a broker over funds lost in what turned out to be a Ponzi scheme. The case was tried to a jury, which returned a verdict in the broker's favor. Judgment was entered accordingly.

The broker filed the present suit against the investor and two of the investor's attorneys, alleging a cause of action for malicious prosecution. Each of the defendants filed a special motion to strike, contending the suit was a "strategic lawsuit against public participation" (SLAPP) (Code Civ. Proc., § 425.16; all undesignated section references are to that code). The trial court granted the motions, finding that the broker was not likely to prevail on the merits of the suit.

We affirm because a reasonable attorney would have thought the investor's claims against the broker were tenable.

I

BACKGROUND

The allegations and facts in this case are taken from the pleadings and the evidence submitted in the trial court with respect to the anti-SLAPP motion.

A. Underlying Action for Misrepresentation

On October 24, 2003, Joseph Fryzer (Fryzer), an investor, filed an action against Steven E. M. Roth (Roth), a broker, and New York Life Insurance Company (NY Life), a brokerage, alleging causes of action for intentional and negligent misrepresentation, among others (*Fryzer v. New York Life Insurance Company* (Super. Ct. L.A. County, 2003, No. BC304883) (*Fryzer* action)). A first amended complaint (complaint) followed on April 7, 2004, alleging essentially the same causes of action. According to the complaint, Roth falsely advised Fryzer about an investment called "Tradex," saying it was an authorized NY Life product when it was actually a Ponzi scheme not offered by NY Life. Fryzer allegedly relied on Roth's statement and invested in Tradex, eventually losing nearly $2.7 million. The *Fryzer* action was filed by the law firm of Barbakow & Ribet.

On August 5, 2005, Barbakow & Ribet substituted out of the action. Attorneys Sanford M. Passman and Herman J. Cohen and their "association of law firms," Passman & Cohen, became Fryzer's counsel of record.

NY Life moved for summary judgment. On February 9, 2006, the motion was granted.

The *Fryzer* action proceeded against Roth on the misrepresentation causes of action and was tried to a jury. On April 20, 2006, the jury returned a verdict in Roth's favor. The jury answered a series of questions on three verdict forms. On a form for the claim of intentional misrepresentation, the jury answered "yes" to the question, "Did Steven Roth make a false representation of an important fact to Joe Fryzer"; it answered "no" to the question, "Did Roth know that the representation was false, or did he make the representation recklessly and without regard for its truth?" On a form for the claim of negligent misrepresentation, the jury answered "yes" to the question, "Did Steven Roth make a false representation of an important fact to Joe Fryzer"; it also answered "yes" to the question, "Did Roth have reasonable grounds for believing the representation was true when he made it?" On a third form, with respect to concealment, the jury answered "no" to the question, "Did Steven Roth intentionally fail to disclose an important fact Joseph Fryzer did not know and could not have reasonably discovered?" Judgment was entered accordingly. No appeal was taken.

B. Present Action for Malicious Prosecution

On September 17, 2007, Roth filed the present action for malicious prosecution, naming 16 defendants, including Fryzer, Attorneys Passman and Cohen, and "Passman & Cohen." In response, Fryzer and the two attorneys filed separate motions to strike under the anti-SLAPP statute (§ 425.16). The record contains no motion on behalf of "Passman & Cohen." (For convenience, we sometimes refer to Fryzer, Passman, and Cohen as defendants.)

Several declarations and exhibits were offered by the parties in connection with the anti-SLAPP motions. The material evidence consisted of the declarations of Fryzer, Barbakow, and Roth, as well as two letters, one written by Barbakow, the other by Roth.

1. Fryzer Declaration

In his principal declaration, Fryzer, the investor, stated: ". . . I first met Steven Roth in the early part of 2001, and was informed by Mr. Roth that he was a highly respected insurance broker with New York Life, as well as a registered representative of New York Life Securities, and was the youngest broker in the history of New York Life Insurance to become a member of their elite Millionaires Club. He further informed me that he had an excellent investment formula that was approved by New York Life and that I should invest in it, and that he had a track record for eleven years in the program he was offering me, which turned out to be 'Tradex Limited,' and that many of his New York Life customers had invested in that opportunity.

". . . Roth assured me that New York Life had authorized the above-referenced investment, and was allowed to be sold by Roth as well as other New York Life agents. Roth gave me a proposal, a prospectus on Tradex with a biography of himself and his business card, some or all of which was contained in a folder. Mr. Roth informed me that he had invested somewhere in the neighborhood of Seven Hundred Fifty Thousand Dollars of his own money in the Tradex Investment, and in fact had shown me statements of his prior five or six years involvement with that investment. Through a series of communications from Roth, I believed that he was in fact what he represented himself to be, a New York Life represented [*sic*], fully authorized to market the Tradex investment. I acquired a level of comfort in the fact that he had invested substantial personal funds, in addition to the fact that he had invited me to a meeting of potential investors, at the Beverly Wilshire Hotel in Beverly Hills, California.

". . . Based on representations made to me by Steven Roth, on August 16, 2001, I made an initial investment in the amount of One Hundred Thousand Dollars ($100,000.00). My investment was made subsequent to a meeting with Roth and an individual identified to me as Susan Lok, at the Lok home. Roth represented to me that Lok was the trader executing the various trades attendant to the Tradex investment, which was essentially an arbitrage program, buying and selling currencies. I was in attendance with Steven Roth and Paul Oravecz at the Lok home, and saw what I believed to be

Susan Lok executing real time trades of various currencies. Subsequent to the demise of the entire Tradex 'scheme,' I became aware that on the occasion referred to herein, in fact Susan Lok was not actually executing a trade. In an abundance of caution, I elected to make the One Hundred Thousand Dollar ($100,000.00) investment to determine whether or not Roth's representations to me, and that which I had witnessed at Susan Lok's residence, were in fact truthful. Subsequent to my making the initial $100,000.00 investment, I requested a return thereof of any appreciation thereon, and in fact did receive back my initial investment with the appropriate appreciation.

". . . I had completed what I believed to be the appropriate due diligence, and believing in the veracity of representations made to me by Roth in his role as a New York Life insurance agent as well as a registered representative of New York Life Securities, I acquired a level of confidence in the Tradex investment to make a very significant second investment in the amount of Nine Hundred Thousand Dollars ($900,000.00). That investment was made on or about March 25, 2002, and was followed by an investment in December, 2002 in the amount of One Million, Five Hundred Thousand Dollars ($1,500,000.00) for a total investment of Two Million Four Hundred Thousand Dollars ($2,400,000.00) all of which I lost when the Tradex scheme collapsed.

". . . Prior to making the substantial investments, Roth had represented to me that Susan Lok was prepared to give me an additional level of comfort and suggested an insurance policy on the life of Susan Lok, with myself as a beneficiary. I was informed through the course of litigation that in fact [a] policy was sold to Lok . . . which purported to name me as a beneficiary of said policy. In the early part of 2003, I was informed that Tradex had collapsed, and my investment of 2.4 million dollars was lost. . . . Prior to initiating litigation through my attorneys Barbakow and Ribet, I acquired enough information to conclude that Steven Roth in fact had completely misrepresented one or more material facts to me, either negligently or intentionally. . . . At a subsequent point in time after the filing of the Fryzer v. New York Life lawsuit, I agreed to substitute in attorneys Sanford Passman and Jason Cohen in place of Daniel Barbakow and Claudia Ribet. . . ."

2. Oravecz Declaration

Oravecz, Fryzer's building contractor, explained in his declaration: ". . . I have known Mr. Roth because he was my financial advisor and insurance agent, and since I was building a house for Mr. Fryzer at the time he made the subject Tradex investment, I happen to have been present and observing much of the conduct and events falsely described by Mr. Roth and his lawyers in their papers. I also knew Susan Lok, the would-be currency trader now in prison, . . . as a result of having had a prior investment history with her before the Tradex fiasco.

". . . The truth was and remains that Joe Fryzer was drawn into and otherwise solicited to make the Tradex investment by Mr. Roth, and not me. . . .

". . . I understand there has been testimony about a 'green folder' of materials given by Roth to Mr. Fryzer concerning Tradex. Before I invested in Tradex, Roth gave me a green folder as well, which contained Roth's resume that displayed Roth's affiliation with New York Life, his picture, and instructions on how I could be involved in the deal.

". . . Mr. Roth in his papers tries to make the Court think that Mr. Fryzer somehow bought Tradex from me, and that Mr. Fryzer did not rely on anything Mr. Roth said or did in making his investment. That is incorrect. I personally observed otherwise. In that regard, as of 2001, before Mr. Fryzer started to invest, I had known Susan Lok, Mr. Roth's 'contact' person regarding the Tradex scheme, for several years. Because I thought I had done exceptionally well with her in prior dealings, at least 'on paper' (and before I would, too, become a victim), I told Mr. Fryzer I had invested. At Mr. Fryzer's request, because of Roth's urgings, I then shared my then positive investment history with Joe Fryzer. I did not ask him to, or try to 'sell' him on, making the deal and was his contractor, not his investment advisor.

". . . Before the Tradex investment was made, I observed that the person soliciting and encouraging Joe Fryzer to make the Tradex investment was Mr. Roth, and not me as falsely claimed by Mr. Roth in his papers. Steven Roth regularly met, in my presence (because as one of Joe's contractors who was doing construction work at the house, I was

often there) with Joe Fryzer at Joe Fryzer's house in the months before Mr. Fryzer made his investment in Tradex, so I was there to hear what was being said. During several of these meetings, I heard Steven Roth talk about what an attractive investment Tradex would be. Finally, one day in early 2001, on a day when Mr. Roth, Joe, and I were together at Joe Fryzer's house, Mr. Roth invited Joe Fryzer to jump in a car with him and drive out to Susan Lok's house in Rowland Heights. The reason stated by Mr. Roth as to why he was suggesting that they should drive to Ms. Lok's house was that Mr. Fryzer could personally observe the electronic currency trading that was supposedly going on. Joe agreed, and he invited me to go along, which I did. I was with Mr. Fryzer for the entire trip to Ms. Lok's home, the meeting with her, and the return trip, and I saw and heard Mr. Roth touting New York Life, Tradex and Susan Lok. In the car, I heard Roth tell Fryzer, 'I am a New York Life agent, and they would not let me sell this if it were not authorized.' I later learned that after that meeting with Susan Lok as set up by Mr. Roth, Joe Fryzer invested.

". . . In late 2003, around the time that I learned Joe Fryzer had sued Roth, in or about the winter of 2003, I was having dinner . . . at Chaya in Venice, California. While dining, we ran into Roth, who happened to be there. The Tradex deal, of course came up. In a discussion of it, Roth said to me . . . he had written authority from New York Life to have been involved in the Tradex deal. Roth also told me that he, Marty Reed and New York Life indeed set up the deal. Marty Reed, I understood, was a retired New York Life employee. After the dinner, I reported what was said in that conversation to Mr. Fryzer.

". . . I did not receive any commissions at any time from any sales of Tradex.

". . . I did not 'sell' Tradex to Joe Fryzer, and I know from my own observations that Mr. Fryzer bought Tradex in large measure because he was duped, like I was duped, by Steven Roth."

3. Barbakow Declaration

In his declaration, Attorney Barbakow, who filed the *Fryzer* action with Attorney Ribet, stated: ". . . In June 2001, Mr. Fryzer met with me to obtain my advice regarding his intended investment in Tradex. Mr. Fryzer told me that Roth had told him that Roth

had located a safe investment vehicle in a foreign currency fund called Tradex. Mr. Fryzer told me that Roth had represented, among other things: (a) that the investment would produce returns for Mr. Fryzer in an amount of at least 45 percent annually, (b) that an investment in Tradex was 'safe' and (c) that the investment in Tradex would be 'guaranteed.' All of this information would subsequently be incorporated into the underlying Complaint and First Amended Complaint. On June 27, 2001, I wrote a letter to Mr. Joseph Fryzer ('Fryzer') regarding his proposed investment in Tradex. . . . While the letter indicated that the Tradex information had been provided by Paul Oravecz, I was aware that Mr. Fryzer had received most of his information about investing in Tradex from Roth. Moreover, Mr. Roth had provided Mr. Fryzer with a pamphlet of materials on Tradex, which included Mr. Roth's curriculum vitae, instructions on how to invest in Tradex, and repeated many of the misrepresentations that Mr. Roth had previously told Mr. Fryzer."

Barbakow's June 27, 2001 letter, which was addressed to Fryzer and Paul Jennings, another investor, stated: ". . . Given our history, I rarely write 'CYA' letters to either of you. In this instance, I want to do so, as I understand you are going to be investing significant sums of money with Paul Oravecz and Tradex.

"I have many comments. I don't intend to set forth all of them herein. I do want you to know the following:

"1. According to Oravecz, this 'investment' returns 45% to 50% annually. If that is the case, it can only be illegal. Common sense tells me a number of things in that regard. First of all, if same were true, Oravecz would be a very wealthy person. Secondly, everyone that you know would be doing this. Third, there would be some demonstrative evidence of the truthfulness of this assertion. Forth [*sic*], you wouldn't care about a guarantee.

"2. You are both sophisticated individuals, and in the event of scrutiny of this transaction by anyone (courts, the IRS, etc.), you will be found to be sophisticated investors. Thus, if the transaction is illegal, I suspect that you would be found to be part and parcel of the illegality. In other words, there is a Latin term that applies to the

transaction. That term is 'In Pari Delicto.' that is [*sic*] means is that if you knowingly enter into an illegal transaction, you are just as guilty as the person who put it together.

"3. Oravecz assures me that the transaction is 'perfectly legal.' He may be one hundred percent (100%) correct, but for the reasons set forth herein, I don't believe it.

"4. We need to talk about what was said with regard to income tax matters.

"5. Although set forth in writing in the guarantee, it is not my expectation that the bank will pay you anything without the guarantor's signature, and that if you incur a loss and she fails to countersign a Request for Withdrawal, you will end up in a lawsuit with her."

In response, Roth, the broker, not Oravecz, sent a letter to Fryzer and Jennings on July 2, 2001. Roth's letter, attached to Barbakow's declaration, stated: "Upon reviewing Mr. Barbakow's letter dated June 27, 2001 . . . , it is apparent that he is not familiar with the matters for which he has written an opinion. . . .

". . . I will address the items in Barbakow's letter:

". . . Mr. Barbakow maintains that 'if an investment has a historical performance of earning 45% or more annually, it must be illegal'. If this were true, than [*sic*] Microsoft share holders and the like are criminals for their astounding returns since the early 80's when their stock was issued at less than 1000% of their current valuations (adjusted for splits). . . .

"<u>As for Paul Oravecz's financial status</u>: Barbakow's statements are profoundly irrelevant. He has no idea as to Paul Oravec's [*sic*] financial status.

"'<u>Everyone you know would be doing it</u>'; This is a private fund. Banks, financial institutions and individuals do engage in this type of trading. This is a multi-trillion dollar actively traded market. Private fund managers such as TRADEX do not typically solicit public accounts. They trade for their own accounts, family, and friends. This is common. . . .

"'<u>There would be some demonstrative evidence of the truthfulness of this assertion</u>'; Considering that you met with the fund manager, Susan Lok, witnessed her operation, and discussed in great detail the means in which she trades and manages the

accounts and the $1,000,000.00 cash guarantee which she is providing, this is overwhelming demonstrative evidence.

". . . RE: 'You wouldn't care about a guarantee'; In light of the aforementioned, I do not see how Barbakow's advice should influence your comfort level. The guarantee is a voluntary assurance and good faith gesture from the fund's manager to earn your trust and to allow her to prove her abilities.

". . . 'You are both sophisticated individuals';

"'If this investment were to be found to be illegal', which it clearly is understood that it is not, 'you would be found guilty by your participation', We all know that Arbitrage does not constitute a security and therefore anyone may transact this activity free of concern. [¶] . . . [¶]

". . . 'Oravecz assures me that the transaction is 100% legal'.

". . . This was addressed in item 2 of the previous page. Mr. Barbakow's opinions on matters for which he is uneducated are irrelevant.

". . . 'We need to talk about what was said with regard to income tax matters';

"Unless he is a CPA or otherwise a tax expert, I do not know how he would be qualified to discuss this with you. The rules are very clear though, it falls under the 'Foreign Earned Income' rules.

"'It is not my expectation that the bank will pay you anything without the guarantor's signature'; As you know, you will be a co-signer on the account and the money cannot be withdrawn without your signature. Furthermore, Susan Lok will honor the written guarantee which assures you to withdraw funds to cover any losses to your $1,000,000.00 principle [*sic*]. This ensures that the funds will be available to make-up a loss should one occur at the end of the 6-month period. Your 6th-month TRADEX statement is all that will be required. In the event of any dispute on either side, both parties shall agree to binding arbitration. [¶] . . .

"This letter addresses the points of Barbakow's letter. . . ." (Bullets omitted.)

Barbakow assessed the effect of Roth's letter as follows: ". . . [I]n reliance upon Roth's pointed 'rebuttals' to the issues I had raised in my June 27, 2001 letter, in August

2001, Fryzer began investing in Tradex, ultimately investing $2,668,000 before Tradex was subsequently revealed as an elaborate *ponzi scheme* in which funds obtained from later investors provided cash to pay amounts promised to earlier investors. As a result, Fryzer lost his entire investment, which he sought my assistance in recovering from those involved in the scheme, including Tradex and its associated individuals Arthur Ferdig, Susan Lok, and Roth, as well as New York Life Insurance Company ('NY Life'), where Roth was an agent."

Barbakow's declaration continued: ". . . Prior to filing the Complaint in the Underlying Action, my partner Claudia Ribet and I performed substantial investigation and research of the claim against Roth and NY Life. Part of this process included determining what effect, if any, my June 27, 2001 letter advising against Fryzer's investment in Tradex would have on Fryzer's claims.

". . . In order to evaluate Fryzer's claims, prior to filing the complaint in the Underlying Action, we had this matter reviewed by attorney Robert Rees, who also addressed the basis of Fryzer's claims against NY Life based on its negligent supervision of Roth and/or vicarious liability as a result of Roth's actions. Mr. Rees opined that the June 27, 2001 letter from [me] to Roth did not preclude a finding of reasonable reliance on the part of Fryzer, in large part because Roth had responded to [my] concerns with his own letter of July 2, 2001, addressing each of the concerns raised in [my] letter.

". . . Additionally, on September 12, 2003, we retained a securities law expert . . . to review this matter on Fryzer's behalf and to make suggestions as to the appropriateness and wording of some of the causes of action.

". . . Additionally, before filing the complaint, I met with [two] FBI agents . . . and spoke with [an assistant] U.S. Attorney . . . , all of whom were conducting a criminal investigation of Tradex, regarding the status and findings of their investigation. As a result of these discussions, we were led to believe that Roth was a subject of the FBI's wire/mail fraud investigation, which served to further convince us that Roth was actively involved in the Ponzi scheme.

". . . The result of our research and investigation indicated that there was probable cause to file and maintain all eight causes of action brought against Roth in the initial Complaint in the Underlying Action. The causes of action for fraud, securities fraud, fraud by an investment advisor, breach of fiduciary duty, negligent misrepresentation, and negligence were all based on the misrepresentations made by Roth to Fryzer about Tradex, in Roth's capacity as a financial advisor. The final two causes of action, for money had and received and for constructive trust, were based on the $2,668,000.00 provided by Fryzer at Roth's direction with respect to Fryzer's investment in Tradex. . . . [W]e [had] the Complaint, and subsequently the First Amended Complaint, including the wording of each cause of action therein, reviewed by a third party prior to filing, namely attorney Edward Gartenberg.

". . . Based on the information described in the preceding paragraphs, on October 24, 2003, Barbakow & Ribet filed on behalf of Fryzer the action entitled *Joseph Fryzer v. New York Life Insurance Co., et. al.*, LASC Case No. BC304883 . . . , which asserted claims against Roth. I caused the complaint in the Underlying Action to be filed and prosecuted because the evidence my office and I obtained indicated the suit had strong merit, including, but not limited to, all the information learned from the sources described above. [¶] . . .

". . . Nothing learned during the course of litigating the Underlying Action prior to Barbakow & Ribet substituting out of the case on August 5, 2005, caused me to question whether there was cause to continue to pursue the Underlying Action and Fryzer's claims against Roth. . . .

". . . Due to the complicated nature of the Ponzi scheme in question, including Roth's involvement in that scheme, we consulted with Mr. Todd Neilson to review this matter on Fryzer's behalf soon after the Underlying Action was filed. Mr. Neilson is a certified public accountant and a former special agent in the FBI specializing in accounting investigation of white-collar and organized crime. He is an expert in the field of forensic accounting and fraud litigation, and has substantial experience investigating Ponzi schemes. On September 8, 2004, Mr. Neilson orally advised Claudia Ribet that my

June 27, 2001 letter was significant due to the fact that it elicited a response from Roth on July 2, 2001 that appeared designed to lull Fryzer into investing in Tradex, which further indicated Roth's involvement in the Ponzi scheme. Mr. Nielson further indicated that the fact that investors participate in Ponzi schemes despite letters like my June 27, 2001 letter was a phenomenon common to Ponzi schemes, and that if good advice prevented such investment, Ponzi schemes would never get off the ground in the first place.

". . . We sought a further expert review of the case from Mr. Charles Pease, a securities expert with particularly [*sic*] knowledge of the operation and structure of NY Life, regarding Fryzer's allegations against NY Life. Mr. Pease opined that NY Life could be determined to have negligently supervised Roth and further that NY Life could be vicariously liable for Roth's actions relating to his solicitation of investments in Tradex. Mr. Pease advised us he was willing to testify to such at trial.

". . . After filing the First Amended Complaint, it became apparent that I could be called as a witness at trial because of my June 27, 2001 letter. Therefore, Ms. Ribet and I determined that it would be best if other counsel substituted into the case in place of Barbakow & Ribet to represent Fryzer's interests. Accordingly, on August 5, 2005, Mr. Sandy Passman of Passman & Cohen substituted into the action as counsel of record for Fryzer and remained counsel of record through the conclusion of trial. . . ."

4. Roth's Declaration

Roth, the broker, stated in his principal declaration: ". . . I was introduced to Susan Lok by Paul Oravecz. Paul Oravecz was the person who got me to invest with Susan Lok, the trader for Tradex.

". . . I had invested my life savings in Tradex, including the inheritance from my parents and grandparents. My account was valued at over one million six hundred thousand dollars at the time Tradex collapsed.

". . . My involvement with Fryzer's investment arose because Lok refused to deal directly with Oravecz due to a personal falling out several years earlier. Since Oravecz could not deal directly with Lok, he enlisted my help in facilitating the investment and dealing with matters that required contact with Lok.

". . . I did not solicit Fryzer to invest in Tradex, nor did I ever suggest that he should invest in Tradex. I was told by both Fryzer and Paul Oravecz that Oravecz had introduced Fryzer to Tradex and provided the information that generated Fryzer's interest in the investment.

". . . In return for helping Oravecz, he offered to split the commission paid by Lok with me. Oravecz and I split the standard 10% commissions on Fryzer's investment.

". . . I never provided Fryzer with a New York Life business card, nor did I ever provide him with three green folders as he claimed at trial. Fryzer produced forged business cards purporting to be mine. Fryzer also attempted to introduce at trial a folder he claimed he received from me in 2001. The business cards contained a misspelling of the company's name, New York Life Securities as '*Securitites*' and also contained many other material errors including omitting my actual business address, listing wrong phone numbers, wrong email addresses and a disconnected pager number. The folders and materials he claimed I gave him in 2001 did not exist at that time and bore 2002 and 2003 copyrights evidencing this.

". . . I never represented that Tradex was a New York Life investment, or in any way connected to or approved by NYLife. Had I wanted to represent Tradex as a New York Life investment, I would have used my New York Life stationery and my New York Life email address, as these would be the clearest and most convincing indications that investors were dealing with New York Life. However, I was careful to not do so, so as to make clear to investors that Tradex was a private, separate deal — in no way connected to NYLIFE or my insurance business.

". . . Fryzer conducted a thorough investigation of his own, which included the following actions undertaken at his direction, control and immediate supervision:

"[1.] Consulted with Dan Barbakow, his lawyer of twenty- [*sic*] years prior to investing;

"[2.] Demanded and obtained a guarantee drafted by his attorney Barbakow between Lok, Tradex's Trader, and Fryzer alone before investing. The guarantee never mentioned any involvement with New York Life or me;

"[3.] Hired a professional trader to audit Lok's trades;

"[4.] Attempted to obtain a fidelity bond on Lok;

"[5.] Met and spoke with Lok numerous times;

"[6.] Performed a real estate check on Lok;

"[7.] Attempted to obtain life insurance on Lok;

"[8.] Spoke with Tradex's President, Arthur Ferdig.

"[9.] Requested an insurance policy on the life of Susan Lok to cover his investment.

". . . In approximately February of 2002, I started my own capital management company called R&D. I repeatedly encouraged Fryzer to get out of Tradex and into R&D because R&D was a more structured investment, and was fully licensed, audited and compliant with all applicable laws. Fryzer declined to invest in R&D and instead made further investments into Tradex — via Lay Chhay Chua, Lok's brother.

". . . Shortly before Tradex collapsed I met with Joe Fryzer. At this meeting, he told me that if anything went wrong with Tradex that he was going to set me up for the fall." (Bullets omitted.)

C. Trial Court's Ruling

In separate orders, the trial court granted the anti-SLAPP motions, concluding Roth had not shown a probability of prevailing on his malicious prosecution claim. A separate judgment was entered in favor of each defendant. Roth appealed.

II

DISCUSSION

Roth contends that, at trial in the present suit, he would likely prevail in showing the *Fryzer* action lacked probable cause and was brought with malice. We agree with defendants that a reasonable attorney would have thought the claims in the *Fryzer* action were tenable. Because Roth's malice argument assumes the *Fryzer* action lacked probable cause, that argument also fails. Accordingly, we affirm the judgments.

The anti-SLAPP statute protects defendants "from interference with the valid exercise of their constitutional rights, particularly the right of freedom of speech and the

right to petition the government for the redress of grievances." (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1052.)

The statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) The statute is to "be broadly construed to encourage continued participation in free speech and petition activities." (*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 Cal.App.4th 15, 22; see § 425.16, subd. (a).)

"As used in [the anti-SLAPP statute], '*act in furtherance of* a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) *any written or oral statement or writing* made before a legislative, executive, or *judicial proceeding*, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e), italics added.)

"[S]ection 425.16 requires that a [trial] court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the [trial] court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.)

Put another way, "a defendant seeking to strike a plaintiff's complaint under section 425.16 has the burden of making a prima facie showing that the plaintiff's allegations are subject to that section. . . . Only if the defendant satisfies that burden, will it then fall to the plaintiff to establish the required 'probability' of success. . . . The defendant's burden requires that it demonstrate that the plaintiff's cause of action arose from some act of the defendant that was taken in furtherance of the defendant's constitutional rights of petition or free speech." (*Gallimore v. State Farm Fire & Casualty Ins. Co*. (2002) 102 Cal.App.4th 1388, 1397, italics omitted; accord, *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315–316.)

"In making its determination, the [trial] court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We review the trial court's decision de novo. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

Here, Roth's claim for malicious prosecution is based on Fryzer's filing and pursuit of civil litigation, that is, the *Fryzer* action. The complaint in this case is therefore subject to the anti-SLAPP statute. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 736–741 & fn. 6; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.)

It follows that Roth has the burden — in the words of the statute — "[to] establish[] that there is a probability that [he] will prevail on [his] claim." (§ 425.16, subd. (b)(1).) "The term 'probability' is synonymous with 'reasonable probability.'" (*Schoendorf v. U.D. Registry, Inc*. (2002) 97 Cal.App.4th 227, 238.)

"The plaintiff's showing of facts must consist of evidence that would be admissible at trial. . . . The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment. . . . If the plaintiff presents a sufficient prima facie showing of facts, the moving defendant can defeat the plaintiff's evidentiary showing only if the defendant's evidence establishes as a matter of law that the plaintiff cannot prevail." (*Hall v. Time Warner, Inc*. (2007) 153 Cal.App.4th 1337, 1346, citations

omitted.) "[T]he court's responsibility is to accept as true the evidence favorable to the plaintiff." (*HMS Capital, Inc. v. Lawyers Title Co., supra*, 118 Cal.App.4th at p. 212.)

To prevail on his cause of action for malicious prosecution, Roth must prove that he was previously sued on a claim that was brought without probable cause, initiated with malice, and pursued to a termination in his favor. (See *Slaney v. Ranger Ins. Co.* (2004) 115 Cal.App.4th 306, 318.)

"Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed. '[T]he standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal . . . , i.e., probable cause exists if "any reasonable attorney would have thought the claim tenable." . . . This rather lenient standard for bringing a civil action reflects "the important public policy of avoiding the chilling of novel or debatable legal claims." . . . Attorneys and litigants . . . "'have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win. . . .'" . . . Only those actions that "'any reasonable attorney would agree [are] totally and completely without merit'" may form the basis for a malicious prosecution suit. . . .'" (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047–1048, citations omitted; accord, *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 822.) "Malicious prosecution . . . includes continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 973.)

"'Probable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in a malicious prosecution action must *separately* show lack of probable cause. Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit — that is, those which lack probable cause — are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause.'" (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 743, fn. 13.)

"""The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action . . . ." "The malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward [the] plaintiff but exists when the proceedings are instituted primarily for an improper purpose. . . ." . . .' . . . . Although lack of probable cause alone does not automatically equate to a finding of malice, it is a factor that may be considered. . . . '[M]alice may still be inferred when a party knowingly brings an action without probable cause. . . .'" (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 204, citations omitted.)

The trial in the *Fryzer* action was limited to the misrepresentation claims. "The elements of intentional misrepresentation, or actual fraud, are: '(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable *reliance*; and (5) resulting damage. . . .'" (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1474, italics added.) """The elements of negligent misrepresentation are similar to intentional fraud except for the requirement of scienter; in a claim for negligent misrepresentation, the plaintiff need not allege that the defendant made an intentionally false statement, but simply one as to which he or she lacked any reasonable ground for believing the statement to be true." . . .'" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 454.)

Although this appeal involves the granting of three separate anti-SLAPP motions, Roth states in his opening brief that all three motions "essentially argu[ed] the same points," and he opts to "discuss[] [them] at the same time." So shall we.

In light of the material evidence presented by the parties in connection with the anti-SLAPP motions, we conclude a reasonable attorney would have thought that the misrepresentation claims in the *Fryzer* action were tenable. In other words, no reasonable attorney would have thought the misrepresentation claims were totally and completely without merit. Fryzer and his attorneys had the right to pursue any claims that were """arguably correct, even if it [was] extremely unlikely that they [would] win."""" (*Plumley v. Mockett*, *supra*, 164 Cal.App.4th at p. 1047.)

The respective declarations show as follows. Fryzer provided his attorneys with a detailed description of his communications with Roth, including: (1) Roth represented himself to be a highly respected insurance broker with NY Life and a registered representative of New York Life Securities; (2) Roth stated that NY Life had approved of Tradex as an investment and had authorized its agents to sell Tradex contracts; (3) Roth advised him to invest in Tradex; and (4) Roth gave him a prospectus on Tradex and a business card. Fryzer told his attorneys he relied on Roth's representations in deciding to invest in Tradex.

Oravecz also invested in Tradex. Oravecz stated that, before he invested in Tradex, Roth gave him a green folder containing Roth's resume, which displayed Roth's affiliation with NY Life, and instructions on how to invest in Tradex. At Roth's urging, Oravecz told Fryzer about his personal success in Tradex. On more than one occasion, Oravecz heard Roth tell Fryzer that Tradex was authorized by NY Life and that Fryzer should invest in it.

Before filing the *Fryzer* action and thereafter, Attorneys Barbakow and Ribet had the merits of the case independently reviewed by others: Before commencement of the action, three other attorneys, one of whom was a securities law expert, examined the case; after commencement, a certified public accountant, a securities expert, and an attorney provided advice on the matter. All of those experts assisted in the development of the case, and none suggested it lacked merit. Barbakow also spoke with an assistant United States attorney and two agents of the Federal Bureau of Investigation about an ongoing criminal investigation of Tradex and a related wire and mail fraud investigation of Roth, leading Barbakow to believe that Roth had been involved in Tradex.

Barbakow's June 27, 2001 letter warned Fryzer against investing in Tradex. Roth's letter in response sought to allay any fears about making an investment. The exchange of those letters and their content suggest Fryzer relied on Roth, not Barbakow or Oravecz, in deciding to invest in Tradex. Because of the significance of the letters, Barbakow realized he could be called as a witness at trial. As a result, he and Attorney

Ribet decided to withdraw as counsel. Defendants Passman and Cohen substituted in. The case was tried less than a year later.

Roth admitted he "facilitat[ed]" Fryzer's investment in Tradex but claimed he was assisting Oravecz, who convinced Fryzer to invest in Tradex. Oravecz, of course, was Fryzer's building contractor, not a broker. Roth also admits he received half of the commission on Fryzer's investment, stating that Oravecz got the other half. Oravecz denied receiving any payment. Roth denied having advised Fryzer to invest in Tradex and having said Tradex was an investment offered by NY Life.

In opposing the anti-SLAPP motions, Roth offered no relevant evidence indicating the *Fryzer* action became untenable only after Passman and Cohen substituted in. Thus, we do not discuss the evidence presented in the Passman or Cohen declarations. Rather, we conclude the evidence contained in the declarations of Fryzer, Oravecz, Barbakow, and Roth, and the letters to Fryzer from Barbakow and Roth, would convince a reasonable attorney that Fryzer's misrepresentation claims were tenable from the commencement of the *Fryzer* action through the end of trial. Roth's evidence would not persuade a reasonable attorney otherwise.

Roth makes several arguments in seeking to reverse the granting of the anti-SLAPP motions. None has merit, as we now discuss.

First, Roth argues that at the trial of the *Fryzer* action, Passman and Cohen produced a "forged" business card bearing Roth's name and the name "New York Life Securities." Although the evidence fails to establish that the card was forged and, if so, by whom, the record does show that more than one version of Roth's business card existed. The card in question had spacing errors, omitted legally required information, and contained the wrong telephone numbers and e-mail address. But Roth does not say why the use of the allegedly forged card is relevant to the anti-SLAPP analysis. Presumably, defendants offered the card to prove that Roth had given it to Fryzer, thereby indicating that Tradex was an investment *sold by NY Life*. In that regard, *every* version of Roth's business card bore NY Life's logo and full name. Thus, if the wrong card was

offered at trial, it still contained accurate information that was relevant to the misrepresentation claims.

Second, Roth contends Fryzer committed perjury at trial as established by a comparison of Fryzer's deposition testimony with his trial testimony. Yet, Roth's appellate briefs do not mention any specific conflicts in the testimony. Instead, he provides a list of the "topics" covered by the testimony and cites the pages of the record on which Fryzer's deposition testimony and trial testimony, respectively, begin. That is inadequate to raise an issue for appellate review. We decline to search the record for specific evidentiary conflicts, if any. (See *Berryman v. Merit Property Management, Inc*. (2007) 152 Cal.App.4th 1544, 1559; *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.)

Nevertheless, we note that, in general, a party may be impeached if his trial testimony conflicts with his deposition testimony. The trier of fact may take any conflicts into account in determining the party's credibility. That a party gives conflicting testimony to a handful of questions at trial does not mean the case was untenable, especially where other testimony from the party, the testimony of other witnesses, and documentary evidence support the merits of the suit.

Third, Roth argues that the evidence he submitted in opposition to the anti-SLAPP motions must be accepted as true, and all inferences must be drawn in his favor. He then concludes we must assume he never made any representations to Fryzer about Tradex and that Fryzer relied solely on Oravecz and others in deciding to invest in Tradex. Not so. The probable cause element of a malicious prosecution claim rests on whether a reasonable attorney would think that the underlying suit was tenable. In assessing the merit of the underlying suit (the *Fryzer* action), a reasonable attorney would not resolve all factual disputes in favor of the defendant (Roth), especially where other witnesses would testify favorably to plaintiff (Fryzer). The "reasonable attorney" test applies to both the client and the attorney. In *Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th 811, a malicious prosecution claim was brought against the attorneys and the parties who brought the prior suit. The court applied the reasonable attorney test, stating:

"[*L*]*itigants* are . . . protected against the danger that a lay jury would mistake a merely unsuccessful claim for a legally untenable one. . . . [P]robable cause is determined objectively, i.e., without reference to whether the attorney bringing the prior action believed the case was tenable . . . . [T]he standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal . . . , i.e., probable cause exists if 'any *reasonable attorney* would have thought the claim tenable.'" (*Id.* at p. 817, italics added, citations omitted; see *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at pp. 741–743 & fns. 11, 13 [applying reasonable attorney test in malicious prosecution claim brought against attorney and client]; *Plumley v. Mocket*, *supra*, 164 Cal.App.4th at pp. 1047–1048 [same]; *Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 62, 66–67 [same].) A reasonable attorney would not have thought the *Fryzer* action was frivolous at any point in its prosecution.

Fourth, Roth asserts that Passman and Cohen should have thought the *Fryzer* action was untenable because Barbakow & Ribet decided to substitute out as Fryzer's counsel. That assertion fails. Barbakow properly concluded he could be called as a witness at trial and did not want to jeopardize the case by what is universally recognized as a potential disadvantage to a client.

Fifth, under the heading, "The 'After the Fact' Brochure," Roth complains that, at trial, Fryzer submitted a Tradex brochure not previously produced, the brochure was dated 2003 — *after* Fryzer's 2001 and 2002 investments in Tradex — and, after the trial, Passman produced the 2003 brochure in response to a document request but did not produce the 2003 "folders," stating they had been lost or destroyed. According to Roth, these "facts" show that Passman and Cohen manufactured and later destroyed evidence in an effort to win a frivolous case. We fail to see how Roth's "facts" lead to that conclusion.

Sixth, each side offered evidence that incentives, demands, or threats were offered or made in attempting to elicit favorable testimony from one or more witnesses. That evidence, if credited, suggests that both sides wanted to prevail. It does not suggest the *Fryzer* action was untenable. In addition, we place no value on the statements by Jay

Schermer and Mark Kayne, who submitted declarations concerning the conduct of Passman and Cohen in a *different* lawsuit against Roth and NY Life (*Jones v. New York Life Insurance Co.* (Super. Ct. L.A. County, 2005, No. BC338788)).

Last, Roth relies on an alleged lack of probable cause in arguing that the *Fryzer* action was brought with malice. Because we have already concluded that probable cause existed, the malice argument fails.

In closing, we note that, on appeal, Passman and Cohen rely in large part on a disciplinary order issued against Roth by the National Association of Securities Dealers (NASD, now known as the Financial Industry Regulatory Authority). According to Passman and Cohen, the NASD found that Roth had solicited investors for Tradex, made representations about Tradex to investors, and failed to inform NY Life of his participation in Tradex. But, as Roth points out, he objected to the admission of NASD order in the trial court, and the trial court sustained the objection. Passman and Cohen fail to mention the objection and do not argue the trial court erred in sustaining it. By presenting a major argument based on excluded evidence and failing to bring to our attention the objection and the trial court's ruling, Passman and Cohen sought to have this court render a decision on an erroneous basis. Thus, we conclude that, in the interests of justice, it is appropriate to deny them costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(5).)

For all of the above reasons, the trial court properly granted the anti-SLAPP motions. Any request for appellate attorney fees (§ 425.16, subd. (c)) should be presented to the trial court on remand (Cal. Rules of Court, rule 3.1702(a), (c)).

III

DISPOSITION

The judgments are affirmed. Respondent Joseph Fryzer is entitled to costs on appeal. All other parties are to bear their own costs.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.